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IN THE SUPREME COURT OF THE STATE OF IDAHO

2004 Opinion No. 115

GEORGE JUNIOR PORTER,

Petitioner-Respondent,

v.

STATE OF IDAHO,

Respondent-Appellant.

Docket No. 29559

Appeal from the District Court of the Second Judicial District of the State of Idaho, Lewis County. Hon. John Bradbury, District Judge.

Hon. Lawrence G. Wasden, Attorney General, Boise, for appellant.

Joan Fisher, Federal Defenders of Eastern Washington & Idaho, Moscow, for respondent.

Andrew Parnes, Ketchum, for respondent.

In a unanimous opinion, the Idaho Supreme Court reversed the order of the district court and remanded the case for further proceedings consistent with this opinion.

In December 1988, the petitioner-respondent George Porter (Porter) beat his girlfriend to death and a jury found him guilty of murder in the first degree. After a sentencing hearing, the district court sentenced Porter to death on September 7, 1990. Porter's sentence was upheld on appeal. Porter filed a second and third application for post-conviction relief, both of which were summarily dismissed by the district court for being successive petitions barred by I.C. § 19-2919. This Court upheld both dismissals.

On August 2, 2002, Porter filed his fourth application for post-conviction relief based upon *Ring v. Arizona*. The State of Idaho (State) moved for summary dismissal pursuant to I.C. § 19-2719(5). The district court held: (1) the application was not barred because prior to *Ring*, Porter did not know and could not know of the claim that the Sixth Amendment requires that a jury, not a judge, find an aggravating circumstance necessary for the imposition of the death penalty; (2) the *Ring* decision was substantive, not procedural, and therefore should be applied to Porter; and (3) vacated Porter's death sentence and ordering that he be re-sentenced, but prohibiting the State from seeking the death penalty at his re-sentencing. The State appealed.

Since Porter filed his fourth application for post-conviction relief the United States Supreme Court decided *Summerlin v. Schiro*, which held that *Ring* is a new procedural rule that does not apply retroactively to cases already final on direct review. Porter argued that *Summerlin* was based upon the Supreme Court's conclusion that Arizona law excluding hearsay evidence made a judge's finding as accurate as the jury's finding of the issue. Because Idaho does not have a similar provision excluding hearsay evidence, *Summerlin* should not be retroactively applied in this case. This Court disagreed. *Summerlin* was not based upon any finding that the Arizona judge's determination was as reliable as the jury's determination nor was it based upon the existence of statutory or case law excluding hearsay. *Summerlin* was solely based on the Supreme Court's determination that *Ring* announced a new procedural rule that would not be applied retroactively to cases already final on direct review. Furthermore, whether hearsay evidence can be considered is an issue that is separate and distinct from the issue of whether a judge or jury makes the determination of an aggravating factor.

Porter also requested this Court apply a more lenient state standard of retroactivity. The issue raised by Porter is based solely on the federal constitution and therefore this is a matter of federal and not state law. *Summerlin* has resolved this issue.

Porter asserted that the privilege of habeas corpus, guaranteed in Art. I, § 5, of the Idaho Constitution could be a vehicle for making *Ring* retroactive. However, habeas corpus is only available to cure certain errors and in this case there was no error.

Porter argued that "trial by jury in criminal cases is fundamental to the American scheme of justice" and the most important element is a trial by a jury rather than a judge. Porter's argument is based upon the misapprehension that *Ring* made statutory aggravating circumstances elements of a new crime – "capital first-degree murder". *Ring*, however, did not elevate the statutory aggravating factors into elements of a crime, nor did it create a new crime. The United States Supreme Court lacks the authority to enact or amend state legislation, only our state legislature has that authority. Under Idaho law there is no such crime as "capital first-degree murder". Murder is categorized as either murder in the first-degree or murder in the second-degree. Porter was properly sentenced to death under the procedures in existence at the time of his sentencing, which had the judge, not a jury, determine whether an aggravating circumstance had been proved beyond a reasonable doubt.

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Finally, Porter claimed that it is unfair for *Ring* not to be applied retroactively merely because his death sentence had already become final on direct appeal. The fairness was an issue to be considered by the United States Supreme Court when it decided *Summerlin*.